

Western New England Law Review

Volume 44 (1981-1982)
Issue 1

Article 2

1-1-1981

TILTING AT WINDMILLS? THE MASSACHUSETTS LOW AND MODERATE INCOME HOUSING ACT

Emily F. Reed

Follow this and additional works at: <http://digitalcommons.law.wne.edu/lawreview>

Recommended Citation

Emily F. Reed, *TILTING AT WINDMILLS? THE MASSACHUSETTS LOW AND MODERATE INCOME HOUSING ACT*, 4 W. New Eng. L. Rev. 105 (1981), <http://digitalcommons.law.wne.edu/lawreview/vol4/iss1/2>

This Article is brought to you for free and open access by the Law Review & Student Publications at Digital Commons @ Western New England University School of Law. It has been accepted for inclusion in Western New England Law Review by an authorized administrator of Digital Commons @ Western New England University School of Law. For more information, please contact pnewcombe@law.wne.edu.

TILTING AT WINDMILLS: THE MASSACHUSETTS LOW AND MODERATE INCOME HOUSING ACT

EMILY FABRYCKI REED*

I. INTRODUCTION

A zoning by-law cannot be adopted for the purpose of setting up a barrier against the influx of thrifty and respectable citizens who desire to live there . . . nor for the purpose of protecting . . . large estates. . . . The strictly local interests of the town must yield . . . [to] the general interests of the public at large. . . .¹

Thus spoke the Massachusetts Supreme Judicial Court more than twenty years before the practice of exclusionary zoning became widely recognized. Parochialism in local land use regulation and a broad concept of the general welfare were judicially juxtaposed as an early prelude to state legislative consciousness of the need for expansive action in housing and land use policy. While the theoretical rationale for intervention in local zoning was supplied judicially in 1942,² the precipitating cause for such intervention did not surface until two decades later in the form of massive racial uprisings in the nation's cities.

This article will analyze the problem of exclusionary zoning in Massachusetts municipalities and will discuss the effectiveness of legislative and judicial countermeasures.

II. HOUSING SHORTAGES AND THE PROBLEM OF EXCLUSIONARY SUBURBAN ZONING AS A PRELUDE TO CHAPTER 774

In Massachusetts, extensive urban renewal and throughway development in Boston and other metropolitan areas displaced thousands of poor and minority persons from their urban neighborhoods. The scarcity of inner city relocation housing caused urban

* B.A., Marquette University, 1963; M.P.A., University of Hartford, 1978; Ph.D., University of Massachusetts, 1982; Lecturer, St. Joseph College, West Hartford, Connecticut.

1. *Simon v. Needham*, 311 Mass. 560, 565-66, 42 N.E.2d 516, 519 (1942).

2. *Id.*

renewal planners to cast a covetous eye on the spacious, but defensive, suburbs.³ Recognizing the potential explosiveness of the situation, the Massachusetts legislature in 1964 created a Special Commission on Low Income Housing to make recommendations for legislative remedies to the housing shortage.⁴ In 1965, based on a finding that approximately 260,000 Massachusetts households resided in substandard housing, the commission recommended that the Massachusetts Housing Finance Agency, a state rental assistance program, and a new public housing production program for families be created.⁵ Although the commission did not focus on dispersal of low and moderate income housing in the suburbs, it did recognize "the possibility of undertaking a metropolitan approach."⁶

By the mid-sixties there no longer was any question that a long-standing and woeful shortage of decent housing⁷ had reached "crisis proportions"⁸ in Massachusetts. In 1967, the Massachusetts Senate commissioned the Legislative Research Council to undertake a detailed study of the problem, especially of the influence of suburban zoning on the housing shortage.⁹ The council's report contained a strong indictment of zoning as contributing to economic exclusion.¹⁰ Although the council attempted to investigate zoning's alleged racially discriminatory effect, it could find no "recent comprehensive studies concerning possible 'anti-minority' uses of local zoning in Massachusetts. . . ."¹¹ The council thus was forced to concentrate on evidence of economic discrimination. Using descriptive statistics, it examined eight alleged restrictive land use devices. Of these, large minimum lot sizes, minimum frontage requirements, setback requirements, and building height limitations were found to add substantially to the costs of construction for single family or multi-family housing, placing such housing beyond the reach of low and

3. J. BREAGY, *OVERRIDING THE SUBURBS* 5-6 (1976).

4. Act of June 30, 1964, ch. 107, 1964 Mass. Acts 761.

5. J. BREAGY, *supra* note 3, at 6.

6. J. BREAGY, *supra* note 3, at 6 (citing FINAL REPORT OF THE SPECIAL COMM'N ON LOW-INCOME HOUSING, MASS. H. DOC. No. 4040, at 81 (1965)).

7. Rodgers, *Snob Zoning in Massachusetts*, in 1970 ANNUAL SURVEY OF MASSACHUSETTS LAW 487, 487 (1971). Rodgers' comments must be read with care, as he was a major drafter of the Act.

8. Board of Appeals v. Housing Appeals Comm'n, 363 Mass. 339, 349, 294 N.E.2d 393, 404 (1973).

9. J. BREAGY, *supra* note 3, at 7.

10. *Id.* (citing RESTRICTING THE ZONING POWER TO CITY AND COUNTY GOVERNMENTS, MASS. S. DOC. No. 1133 (1968)).

11. *Id.* at 28.

moderate income households.¹² In addition, local zoning officials had "an enormous advantage"¹³ over open housing advocates because the Massachusetts Zoning Enabling Act provided that zoning amendments must be approved by a two-thirds majority of the local legislature or town meeting.¹⁴ Mustering such approval for low income housing in suburbia is a practical impossibility.

The report of the Legislative Research Council precipitated a flurry of bills drafted by sympathetic state legislators.¹⁵ The formats of the proposed legislation were highly influenced by recommendations of the Federal Kaiser Committee¹⁶ and the Douglas Commission.¹⁷ The Kaiser Committee recommended that the Secretary of Housing and Urban Development be given limited power to override zoning ordinances that prevent construction of federally subsidized, low income housing.¹⁸ The Douglas Commission recommended that state governments create administrative agencies empowered to review local decisions and "to substitute [their] decisions" for local policies adjudged to be exclusionary.¹⁹ The concept of higher levels of government intervening in local zoning and the creation of a state agency to do so were incorporated into bills introduced before the General Court.²⁰ The Joint Legislative Committee on Urban Affairs consolidated these proposals into one bill and reported it out to the full legislature.²¹ In August 1969 the bill became chapter 774,²² commonly known as the antisnob zoning act.

Chapter 774 passed the Massachusetts legislature in 1969 de-

12. *Id.* at 16-20. *See also* Board of Appeals v. Housing Appeals Comm'n, 363 Mass. 339, 348-49, 294 N.E.2d 393, 403-04 (1973). Green space zoning, minimum buildable areas of lots, minimum floor area requirements, and inspection and permit fees were found not to have this adverse impact.

13. Rodgers, *supra* note 7, at 487.

14. MASS. GEN. LAWS ANN. ch. 40A, § 5 (West 1979).

15. *See, e.g.*, Act of Dec. 22, 1975, ch. 808, 1975 Mass. Acts 1115 (codified at MASS. GEN. LAWS ANN. ch. 40A, § 5 (West 1979)).

16. PRESIDENT'S COMM'N ON URBAN HOUSING, A DECENT HOME (1969) [hereinafter cited as A DECENT HOME].

17. NATIONAL COMM'N ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY (1969) [hereinafter cited as BUILDING THE AMERICAN CITY].

18. A DECENT HOME, *supra* note 16, at 25.

19. BUILDING THE AMERICAN CITY, *supra* note 17, at 40. *See also* J. BREAGY, *supra* note 3, at 8-9.

20. Board of Appeals v. Housing Appeals Comm'n, 363 Mass. 339, 350, 294 N.E.2d 393, 404 (1973).

21. J. BREAGY, *supra* note 3, at 10.

22. Act of August 23, 1969, ch. 774, 1969 Mass. Acts 712 (codified at MASS. GEN. LAWS ANN. ch. 40B, §§ 20-23 (West 1979)).

spite the growing political clout of the suburbs²³ and despite the adoption in 1965 of the Massachusetts home rule amendment.²⁴ The home rule amendment both strengthened local governmental powers and created a "presumption in favor of validity" for zoning ordinances.²⁵ Only as a result of a fortuitous convergence of political issues and circumstances did chapter 774, an act impinging on local governmental zoning prerogatives, pass the Massachusetts legislature. Suburban exclusionary zoning was debated in the legislature "within the context of an urban-suburban conflict that had arisen over the issue of *de facto* school segregation in Boston and other cities."²⁶ Suburban liberals in 1966 had succeeded in passing a racial imbalance law that forced the integration of city schools.²⁷ Urban legislators, representing the large, ethnic, working class neighborhoods of Boston and other major cities, were resentful and vindictive.²⁸ In order to return the integration favor to the suburbs, these urban legislators sought passage of chapter 774.²⁹ Joining forces with the urban legislators were suburban pro-housing liberals, both Democrats and Republicans, who wanted their communities to provide adequate housing for their resident poor.³⁰ These two factions were able to coalesce into a "'one-shot deal . . . a rather unholy alliance'"³¹ to pass chapter 774. In 1975 the legislature substantially revised the Massachusetts Zoning Enabling Act³² and adopted the Zoning Act,³³ allowing localities to take advantage of newer zoning devices, such as cluster and planned unit development zoning,³⁴ and to expedite zoning procedures.³⁵ The legislature, how-

23. See M. DANIELSON, *THE POLITICS OF EXCLUSION* 323 (1976).

24. MASS. CONST. amend. art. II.

25. Healy, *Massachusetts Zoning Practice Under the Amended Zoning Enabling Act*, 64 MASS. L. REV. 157, 165 (1979).

26. J. BREAGY, *supra* note 3, at 9.

27. MASS. GEN. LAWS ANN. ch. 15, § 11 (West 1981); *id.* ch. 71, § 37D (West Cum. Supp. 1981).

28. J. BREAGY, *supra* note 3, at 9.

29. *Id.* at 10. See also Altman, *Anti Snob Law Produces Low Income Housing*, 6 PRACTICING PLANNER 31, 31 (1976).

30. Altman, *supra* note 29, at 31.

31. J. BREAGY, *supra* note 3, at 10 (quoting State Rep. Martin Linsky at Suburban Housing Conference, Brandeis University, May 1971.)

32. Act of Dec. 22, 1975, ch. 808, 1975 Mass. Acts 1112 (codified as amended at MASS. GEN. LAWS ANN. ch. 40, §§ 32, 32A (West Cum. Supp. 1981)).

33. *Id.* (codified as amended at MASS. GEN. LAWS ANN. ch. 40A, §§ 1-17 (West 1979 & Cum. Supp. 1981)).

34. Healy, *supra* note 25, 168.

35. McLaughlin, Jr., *The Obligation of the State Legislature to Amend the New Zoning Act*, 63 MASS. L. REV. 149, 149 (1978).

ever, reaffirmed its commitment to subsidized housing by reincorporating chapter 774 into the general statutes in essentially the same form as the earlier version.³⁶ The law took on a new name and became the Low and Moderate Income Housing Act of 1975 (the Act).³⁷

III. PURPOSES AND PROVISIONS OF THE ACT

The Act like its predecessor, chapter 774, is designed to facilitate the construction of low and moderate income housing in suburbia.³⁸ A major provision of the Act authorizes local zoning boards of appeals to issue comprehensive building permits to qualified developers of any housing subsidized by the state or federal governments.³⁹ Qualified developers are defined as limited dividend corporations, nonprofit organizations, and public agencies.⁴⁰ The comprehensive permit procedure does not extend to profitmaking developers. The legislature feared that such builders would abuse the procedure by inundating the suburbs with low income housing purely for speculative gain.⁴¹ The purpose of issuing one, comprehensive permit is to simplify the red tape facing a developer who previously had to apply for a variety of local approvals and permits. Included among these approvals and permits were a two-thirds approval of the city council or town meeting if a zoning change was required, subdivision approval, informal approval of the town engineer, approvals of the building inspector, fire chief, and health commissioner, and electric and gas permits.⁴² In place of these permits and approvals, the new procedure authorizes issuance of one, comprehensive permit that would hasten the beginning of construction.

Standards are set out by which zoning boards of appeals are to judge the merits of applications for comprehensive permits. Permits may be issued despite local requirements and regulations preventing low income housing unless such requirements and regulations are "reasonable and consistent with local needs."⁴³ The phrase "consis-

36. Only a few, minor references to pages were changed.

37. MASS. GEN. LAWS ANN. ch. 40B, §§ 20-23 (West 1979).

38. Board of Appeals of Hanover v. Housing Appeals Comm'n, 363 Mass. 339, 353-54, 294 N.E.2d 393, 406 (1973).

39. MASS. GEN. LAWS ANN. ch. 40B, §§ 20-21 (West 1979).

40. *Id.* For all practical purposes, a public housing authority is a public agency. Note, *A Wrong Without a Remedy: Judicial Approaches to Exclusionary Zoning*, 6 RUT.-CAM. L.J. 727, 743 (1975). See also J. BREAGY, *supra* note 3, at 20.

41. Note, *supra* note 40, at 744.

42. Altman, *supra* note 29, at 31.

43. MASS. GEN. LAWS ANN. ch. 40B, § 20 (West 1979).

tent with local needs" is two-pronged: It applies both to conditions designed to promote dispersed low income housing (promotional criteria) and to criteria that legitimize local planning concerns and that may prevent low income housing (planning criteria).

The promotional criteria state that requirements and regulations are neither reasonable nor consistent with local needs if they do not account for "the regional need for low and moderate income housing considered [together] with the number of low income persons in the city or town affected. . . ." ⁴⁴ The regional need and number of low income persons are made operational by three, numerical minimums. The housing minimum requires issuance of a comprehensive permit when low and moderate income housing comprises less than 10% of the number of housing units in a town or city according to the last decennial census. Land area minimums require the issuance of a comprehensive permit if low and moderate income housing currently exists on less than 1.5% of land zoned for residential, commercial, and industrial use in a town or city. The land area minimums also require a permit if the application would result in the commencement of construction of less than .75% of land zoned for residential, commercial, or industrial uses, or ten acres, "whichever is larger, in any one calendar year." ⁴⁵ For most purposes, boards, towns, and developers use the 10% land minimum as a measure of whether the town has met its regional need. Few town governments or developers, however, have more than a hazy conception of how much of a particular town's land area is zoned for residential, industrial, and commercial uses. They therefore are unable to compute whether a given project would comprise more or less than 1.5% of land zoned for residential, industrial, and commercial uses or would result in low income housing on more than .3% of land so zoned in a calendar year. Developers, however, generally will adhere to the ten-acre minimum. If their tract is larger than ten acres, they plan construction on fewer than ten acres and leave the remainder as open space. ⁴⁶

The local planning criteria, which protect local concerns and developmental peculiarities, are intended to be balanced against the promotional criteria standard of consistency with local low and moderate income housing needs. ⁴⁷ The balancing test seeks to miti-

44. *Id.*

45. *Id.*

46. See Board of Appeals of Maynard v. Housing Appeals Comm'n, 370 Mass. 64, 67-68, 345 N.E.2d 382, 385 (1976).

47. Rodgers, *supra* note 7, at 489.

gate the measures for relieving Massachusetts' "housing crisis"⁴⁸ by taking into consideration local objections to subsidized housing. Politically, the test is the result of an attempt to assuage suburban legislators objecting to the intent of the law and thus to negate their opposition.

Under the planning criteria, requirements and regulations that hinder the construction of low and moderate income housing are consistent with local needs and will prevent the issuance of a comprehensive permit if they "protect the health or safety of the occupants of the proposed housing or of the residents of the city or town, . . . promote better site and building design in relation to the surroundings, . . . preserve open spaces, and . . . are applied as equally as possible to both subsidized and unsubsidized housing."⁴⁹ These criteria enable the town or city to condition housing so as to prevent substandard construction and incongruence with local land or developmental characteristics.

A second major provision of the Act provides that a developer may appeal a denial of a comprehensive permit by the board of appeals to the Housing Appeals Committee (HAC) in the Massachusetts Department of Community Affairs (DCA).⁵⁰ In addition, a permit also may be appealed if conditions attached to it make the construction of the housing project "uneconomic."⁵¹ Construction is uneconomic if a public agency or nonprofit organization would suffer financial loss or if a limited dividend corporation could not realize a reasonable return.⁵²

The HAC is an administrative agency comprised of five, appointed members who are represented by permanent counsel and empowered with quasi-judicial functions. The HAC is authorized to hold de novo hearings and to order a comprehensive permit issued if a zoning board of appeals ruling is found to be "unreasonable and not consistent with local needs"⁵³ under the promotional and planning criteria.

IV. JUDICIAL INTERPRETATIONS OF CHAPTER 774

As a legislative compromise, the provisions of chapter 774,

48. Sussna, *Remedying Exclusionary Zoning Practices in Suburbia*, 28 U. FLA. L. REV. 671, 679 (1976).

49. MASS. GEN. LAWS ANN. ch. 40B, § 20 (West 1979).

50. *Id.* § 22.

51. *Id.*

52. *Id.* § 20.

53. *Id.* § 22.

which now comprise the Act, necessarily are vague and ambiguous. For example, ambiguity pervades the procedure requiring boards of appeals and the HAC to balance the promotional criteria for low and moderate income housing with legitimate local planning concerns.⁵⁴ No guidelines are given regarding the appropriate weight to be attached to conflicting regional housing and local planning needs. How the terms "region" and "regional needs" are to be defined is unclear.⁵⁵ Further, the phrase "requirements and regulations" does not name zoning ordinances or practices explicitly. Thus, there was some question as to whether boards of appeals and the HAC could overrule duly passed and promulgated zoning laws and decisions.⁵⁶ Also unclear was the kind of evidence a developer was to present⁵⁷ and the specifics of the appeals procedure to the HAC.⁵⁸ Finally, no mention was made concerning what property interest a developer was required to have in a proposed site in order to be granted standing for a comprehensive permit request or an appeal to the HAC.⁵⁹

Throughout the 1970's, a steady stream of cases were appealed from the HAC to the Massachusetts Supreme Judicial Court. In the initial case, *Hallenborg v. Town Clerk of Billerica*,⁶⁰ the court ruled that limitations on apartment size were not unreasonable. Defendant had restricted living units in apartment districts to "three rooms, a kitchen, and a bath."⁶¹ The court held that such limitations did not conflict with the purpose of chapter 774. Rather, they reflected a legitimate planning concern and were consistent with local needs.⁶²

Although *Bellows Farms v. Building Inspector of Acton*⁶³ did not concern chapter 774 directly, the case gave further support to local use of planning concerns as a rationale for limiting apartment construction. In *Bellows Farms*, the proposal of the developer for apartments was certified as conforming to the zoning for the proposed site and as not requiring subdivision approval.⁶⁴ Subsequently, the town voted several zoning amendments that limited the number of apart-

54. Rodgers, *supra* note 7, at 493.

55. See Note, *supra* note 40, at 745.

56. Rodgers, *supra* note 7, at 491.

57. *Id.* at 493.

58. Note, *The Massachusetts Zoning Appeals Law: First Breach in the Exclusionary Wall*, 54 B.U.L. REV. 37, 38 (1974).

59. *Id.* at 50.

60. 360 Mass. 513, 275 N.E.2d 525 (1971).

61. *Id.* at 521, 275 N.E.2d at 531.

62. *Id.*

63. 364 Mass. 253, 303 N.E.2d 728 (1973).

64. *Id.* at 254, 303 N.E.2d at 729.

ments from the original proposal of 435 to 203.⁶⁵ The court held that the Act protected only the proposed use of the site as zoned, and that it did not "prevent changes which affected the intensity of the use."⁶⁶ This decision provided towns with a major weapon for restricting, if not eliminating, the construction of multi-family housing.⁶⁷

The major judicial interpretation of chapter 774 came in 1973 in *Board of Appeals of Hanover v. Housing Appeals Committee*.⁶⁸ The boards of appeals of two towns, Hanover and Concord, appealed decisions of the HAC that had ordered the issuance of comprehensive permits for low and moderate income housing. By agreement, the two cases were argued and decided together.⁶⁹

In *Hanover*, the local boards argued that chapter 774's purpose merely was to speed up the permit process by authorizing comprehensive permits and that the legislature did not intend to give the boards of appeals or the HAC power to override local zoning by laws or ordinances.⁷⁰ In rejecting this argument, the court stated that the evolution of chapter 774,⁷¹ the record of the legislative debate,⁷² and the report of the Legislative Research Council,⁷³ indicated that the legislature was interested primarily in censuring that low and moderate cost housing be built in dispersed locations. As the mere facilitation of the permit process could not alone increase the construction of such housing,⁷⁴ the court construed chapter 774 as granting the boards of appeals and the HAC the power to override zoning ordinances.⁷⁵

The court also held that the home rule amendment did not prevent the state from authorizing a state agency to override local prerogatives in zoning. Although local powers were acknowledged as substantial, the court held that they could not be used to frustrate "the purpose or implementation of a general or special law enacted by the Legislature."⁷⁶ The legislature retains "supreme power"

65. Healy, *Land Use and Planning*, in 1974 RECENT DEVELOPMENTS IN MASSACHUSETTS LAW VI-7 (Mass. Continuing Legal Educ. 1974).

66. *Id.* at VI-8.

67. *Id.*

68. 363 Mass. 339, 294 N.E.2d 393 (1973).

69. *Id.* at 343, 294 N.E.2d at 400.

70. *Id.* at 346-47, 294 N.E.2d at 402.

71. *Id.* at 353-54, 294 N.E.2d at 406.

72. *Id.* at 354-55, 294 N.E.2d at 406-07.

73. *Id.* at 349-50, 294 N.E.2d at 403-04.

74. *Id.* at 354, 294 N.E.2d at 409.

75. *Id.* at 383, 294 N.E.2d at 423.

76. *Id.* at 360, 294 N.E.2d at 409.

when it is legislating general laws, such as chapter 774, that apply "to two or more municipalities."⁷⁷

The boards of appeals argued that because the provisions of chapter 774 lacked sufficient standards to limit the exercise of administrative discretion, delegating to the HAC the power to override local zoning ordinances constituted an "unlawful delegation of legislative authority."⁷⁸ In rejecting this argument, the court held that because the legislature's power over zoning is "supreme," it constitutionally may delegate to the HAC the power to override local zoning.⁷⁹ Further, because the legislature had provided the HAC with clear standards for the exercise of its overriding power, there was no merit to the contention that the law was unconstitutionally vague. The housing and land minimums, which determine when local zoning ordinances are consistent with local needs, "define precisely the municipality's minimum housing obligations."⁸⁰ The minimums also delineate clearly "that point where local interests must yield to the general public need for housing."⁸¹

In the course of rejecting the unconstitutional-for-vagueness argument, the court clarified the balancing test by establishing the weight to be given to both the low and moderate income housing promotional criteria and the local planning criteria. If a community fails to meet any of the housing or land area minimums contained in the promotional criteria, there is "a strong basis for finding that the regional need outweighed local planning objectives."⁸² Failure to meet the promotional criteria creates a presumption that any planning objective offered as a justification for prohibiting the construction of subsidized housing is not consistent with local needs, and the town has the burden of disproving that presumption.⁸³

In one of its two final points, the court held that the authorization given by a board of appeals or the HAC to construct multifamily housing on specific parcels does not constitute illegal spot zoning. The court reasoned that the intent of such zoning changes is to benefit the public welfare rather than to provide economic benefit for the property owner.⁸⁴ The court also ruled that developers need

77. *Id.*

78. *Id.* at 363, 294 N.E.2d at 411.

79. *Id.* at 357, 294 N.E.2d at 408.

80. *Id.* at 366, 294 N.E.2d at 413.

81. *Id.* at 383, 294 N.E.2d at 423.

82. *See* Note, *supra* note 58, at 57.

83. *Id.* at 58.

84. 363 Mass. at 363, 294 N.E.2d at 410-11.

not have present title to the land involved in a proposal in order to have standing before a board of appeals or the HAC.⁸⁵ Permits can be issued conditioned on a determination, by the appropriate state or federal agency, of the developer's eligibility for financing.⁸⁶ It can be inferred from the court's holding that a developer need only have an option or commitment from the landowner to transfer title to the land upon attainment of financing and public endorsement.

Hanover addressed many of the major ambiguities surrounding chapter 774. Most significantly, by upholding the constitutionality of chapter 774, the court enabled developers to plan for future construction and to begin to use the comprehensive permit and appeals processes with the assurance that the law would not be declared void or repealed.

Subsequent supreme judicial court cases further clarified the parameters and applications of chapter 774. In *Mahoney v. Board of Appeals*,⁸⁷ the court held that the power of the boards of appeals and the HAC to override local requirements and regulations extends to subdivision bylaws as well as zoning practices.⁸⁸ Relying on *Hanover*, the court reasoned that as the purpose of chapter 774 was to facilitate the construction of low and moderate income housing in areas that practice exclusionary zoning, the statute must be construed so that both zoning ordinances and bylaws are treated like any other local restriction. The court also clarified the appeals procedure by holding that variations in the method of appeal do not deny equal protection. Under chapter 774, a developer may appeal the denial of a comprehensive permit directly to the HAC, while one aggrieved by its issuance must appeal to the courts. The court held that as "there are no substantial differences between the alternative methods of review,"⁸⁹ requiring persons or municipalities aggrieved by the issuance of a comprehensive permit to appeal to the courts does not constitute a denial of equal protection.⁹⁰

Mahoney was appealed to the United States Supreme Court, but the appeal was dismissed for lack of a federal question.⁹¹ In effect,

85. *Id.* at 378, 294 N.E.2d at 420.

86. *Id.*

87. 366 Mass. 228, 316 N.E.2d 606 (1974), *appeal dismissed*, 420 U.S. 903 (1975).

88. *Id.* at 232-33, 316 N.E.2d at 609.

89. *Id.* at 232, 316 N.E.2d at 608 (quoting *Hanover*, 363 Mass. at 371, 294 N.E.2d at 416).

90. *Id.*

91. 420 U.S. 903 (1975).

the legitimacy of chapter 774 under the federal constitution was upheld.

In *Board of Appeals of Haverhill v. Housing Appeals Committee*,⁹² the court addressed a claim by the town that inadequate sewers made a low income housing project inconsistent with local needs. The court ruled that the HAC had attached sufficient conditions to the permit to insure the health and safety of the project and the town residents. Further, the court held that as it was clear that the project would be connected with the public sewer system, no sewage would be discharged into any public waterways.⁹³ Thus, the *Haverhill* court implied that lack of existing sewers is not a sufficient planning consideration to prevent low income housing under the consistency with local needs standards and that the regional need for housing outweighs any such consideration.

As previously stated, chapter 774 was reincorporated into the general statutes in 1975. Since 1975, several cases under the Act have reached the supreme judicial court. In *Bailey v. Board of Appeals of Holden*,⁹⁴ the court further clarified the specifics of the Act's appeals procedure. In *Bailey*, the board of appeals failed to hold a public hearing before issuing a comprehensive permit for the construction of low income housing on a five-acre site of which Bailey owned approximately three and one-half acres.⁹⁵ Although conceding that no statute required such a hearing, Bailey argued that he had a constitutional right to a hearing before the board of appeals selected a site.⁹⁶ In rejecting this argument, the court held that "[t]he determination of what property is to be taken and used for public housing is a legislative function, not requiring a prior hearing as a matter of constitutional right."⁹⁷

The *Bailey* court also addressed the issue of standing to seek a comprehensive permit under the Act. Bailey argued that the grant of the comprehensive permit was invalid because the housing authority did not own the proposed site when it filed its application with the board of appeals. Citing *Hanover*, the court held that "[o]wnership of a site is not a condition precedent to the right of a public agency to seek a comprehensive permit."⁹⁸ The housing authority had stand-

92. 3 Mass. App. Ct. 755, 329 N.E.2d 138 (1975).

93. *Id.* at 756, 329 N.E.2d at 139.

94. 370 Mass. 95, 345 N.E.2d 367 (1976).

95. *Id.* at 96, 345 N.E.2d at 368-69.

96. *Id.*, 345 N.E.2d at 369.

97. *Id.* at 97, 345 N.E.2d at 369.

98. *Id.*

ing before the board of appeals because its seriousness in building was apparent from its preparation of a thorough site selection study and comprehensive plans, its contracting with the DCA for development, and its prior arrangement for financing.⁹⁹

Complicated political manipulations resulted in an apparent antihousing decision by the supreme judicial court in *Town of Chelmsford v. DiBiase*.¹⁰⁰ Subsequent to the landowner's application for a comprehensive permit, the town voted to take the proposed low income housing site by eminent domain for conservation purposes. The HAC sought to override the taking as a local requirement or regulation that restricted the construction of low income housing. The court stated that a town meeting decision to take by eminent domain, if done in good faith, is not a "requirement or regulation," but a "transfer of ownership" that does not fall within the overriding power of the board of appeals or the HAC.¹⁰¹

The history of the transactions elucidates the good faith reasoning. Apparently, the landowner used the threat of building public housing on his land as leverage to persuade the town to take his land by eminent domain. For several years, he had attempted to sell his land to the town for conservation purposes. Twice the town had failed to authorize the taking. The developer then turned to the alternative of using his land for low income housing as an incentive for the townspeople to take action on the issue. In its ruling the court put boards of appeals on notice that the comprehensive permit process is not to be used as a political weapon against the reluctant townspeople for their failure to support a land use decision that both the landowner and public officials support. Although the property owner and the town may have lacked good faith, the townspeople did act in good faith. The history of the negotiations surrounding the parcel illustrated that the actions of the townspeople were not aimed at preventing the construction of a low income housing project. Rather, by voting to take the site by eminent domain for conservation purposes, the townspeople merely opted to use the property in a manner they previously had considered.

*Board of Appeals of Maynard v. Housing Appeals Committee*¹⁰² clarified three procedural issues and expanded upon the *Hanover* balancing test by reaffirming the primacy of regional housing needs

99. *Id.*

100. 370 Mass. 90, 345 N.E.2d 373 (1976).

101. *Id.* at 93-94, 345 N.E.2d at 374-75.

102. 370 Mass. 64, 345 N.E.2d 382 (1976).

over local planning concerns. In *Maynard*, the board of appeals of the town of Marynard denied a developer a comprehensive permit. On appeal, the HAC vacated the board's order and mandated issuance of the permit, subject to stated conditions. Rejecting three procedural arguments made by the board, the court held: 1) That three of the five members of the HAC could decide cases if proper procedures for a full and fair hearing were followed;¹⁰³ 2) that the HAC validly could condition a permit upon compliance with requirements of the Massachusetts Environmental Policy Act;¹⁰⁴ 3) and that developers could qualify as an organization entitled to standing before the board of appeals even though they would not receive their partnership papers or, by implication, articles of incorporation until after the boards of appeals hearing.¹⁰⁵

In interpreting the balancing test, the *Maynard* court designated the weight to be given to two local concerns. First, the town claimed that as the low income project would result in the crowding of schools, the project was inconsistent with local education needs. The HAC, however, had addressed this issue adequately and found it to be an insufficient basis for denying a comprehensive permit when balanced against the need for low income housing in the region.¹⁰⁶ The court held that the need for low and moderate income housing outweighs the local fiscal need of preventing school overcrowding or increased school expenditures. Thus, a town cannot escape its responsibility to provide subsidized housing by claiming that an influx of children will raise education costs.

Second, in expanding on its sewer ruling in *Haverhill*, the court rejected the town's claim that the HAC had violated the planning criteria of the "consistency with local needs" standard by authorizing an extension of the public sewers as a condition to granting the permit without the approval of the town.¹⁰⁷ As the developer had agreed to construct an extension of the sewer line at his own expense and to post an adequate performance bond, the town would not incur additional expenses for sewers. The issue, therefore, was moot. The HAC could dispense with town approval "as a requirement or regulation not consistent with local needs."¹⁰⁸ Again, the promotional criterion of the need for housing outweighed the local plan-

103. *Id.* at 65-66, 345 N.E.2d at 384.

104. *Id.* at 66-67, 345 N.E.2d at 384.

105. *Id.* at 67, 345 N.E.2d at 385.

106. *Id.* at 68, 345 N.E.2d at 385.

107. *Id.* at 68-69, 345 N.E.2d at 385-86.

108. *Id.* at 69, 345 N.E.2d at 386.

ning concern. In both *Maynard* and *Haverhill*, the court clearly indicated that fiscal zoning will not be tolerated if regional housing needs are not met.

In *Board of Appeals of North Andover v. Housing Appeals Committee*¹⁰⁹ the court was confronted with the issue of whether the state building code could be overridden by the HAC. The provision of the state building code at issue pertained to procedures for resolving disputes and not to any substantive building regulations.¹¹⁰ The court held that the HAC could not override the state building code or establish procedures that were alternative to those of the code. Rather, the power of the HAC to override extended only to local requirements and regulations and it was not authorized by the legislature to override state law.¹¹¹

The dissent in *North Andover* emphasized that the HAC had required construction according to the state building code and had limited the alternative procedures to disputes between the builder and local officials over code interpretation.¹¹² The HAC's alternative procedure did not apply to disputes between the builder and state officials and, therefore, did not affect state officials' powers.¹¹³

Most recently, in *Board of Appeals of Melrose v. Housing Appeals Committee*,¹¹⁴ the court ruled that if a builder agrees to a delay, the HAC does not have to render its decision within the thirty-day period required by the Act because the provision requiring a timely decision is designed to benefit the developer. A board of appeals, therefore, "has no standing to complain of the delay."¹¹⁵

Subsequent to these cases, the Massachusetts Supreme Judicial Court has not heard an appeal under the Act, although at least one appealed case has been affirmed without comment.¹¹⁶ Apparently, local officials and private parties opposed to low and moderate income housing development in suburbia have realized that most of the justiciable issues under the Act have been resolved and that the early uncertainties about the interpretation of the Act's meaning and

109. 4 Mass. App. Ct. 676, 357 N.E.2d 936 (1976).

110. *Id.* at 678-79, 357 N.E.2d at 937-38.

111. *Id.* at 680, 357 N.E.2d at 938-39.

112. *Id.* at 683, 357 N.E.2d at 940 (Goodman, J., dissenting, joined by Brown, J.).

113. *Id.*

114. 5 Mass. App. Ct. 838, 363 N.E.2d 548, *appeal denied*, 373 Mass. 864 (1977).

115. *Id.*

116. *Board of Appeals v. Housing Appeals Comm'n*, 373 Mass. 865, 364 N.E.2d 1296 (1977).

procedures have been clarified. Therefore, any further challenge to the Act will prove to be a costly and fruitless effort.

V. CRITICISMS OF THE ACT

The Act has been highly praised as a step forward in state initiative for combatting exclusionary zoning. Nevertheless, it also has been highly criticized as an imperfect instrument for eliminating the exclusionary effects of suburban zoning. The criticisms of the Act can be divided into three categories: The substance of the Act; the procedural aspects of the comprehensive permits and appeals processes; and the Act's adverse effects on comprehensive planning.

A. *Substance of the Act*

A major substantive criticism of the Act is that it only facilitates the construction of low and moderate income, multifamily housing. In doing so, the Act does little more than "disperse ghettos."¹¹⁷ Although the Legislative Research Council has characterized many of the devices of suburban single family zoning as exclusionary,¹¹⁸ the Act makes no attempt to regulate these devices or to alleviate their exclusionary effects.¹¹⁹ Thus, the Act is less than half a remedy, as excessive requirements of single family zoning are at least as extensive as the practice of directly zoning out low income, multifamily housing.

A second criticism is that the threshold set by the three, numerical, promotional criteria that trigger the comprehensive permit and appeals processes is far too low. Exempting jurisdictions with 10% of their housing, 1.5% of their industrially, commercially, and residentially zoned land for low and moderate income housing, or .3% of their industrially, commercially, and residentially zoned land, or ten acres, already committed to low and moderate income housing in any calendar year, allows many communities to escape their fair share of the regional housing need. The need, however, may be far greater than what these small percentages indicate.¹²⁰

Further, even if the promotional criteria are not raised to a higher level, they nevertheless require substantial revision. The two land area percentage minimums are meaningless standards. They

117. See Note, *supra* note 58, at 70.

118. See text accompanying notes 7-10 *supra*.

119. See Note, *supra* note 58, at 70.

120. See Note, *supra* note 40, at 743. See also Note, *The Inadequacy of Judicial Remedies in Cases of Exclusionary Zoning*, 74 MICH. L. REV. 760, 791 (1976).

assume a level of statistical sophistication that, for the most part, is lacking in developers' offices, suburban planning departments, lay boards of appeals, and the HAC. If land area minimums cannot be computed, they cannot be used to activate the comprehensive permit process or to determine whether regional needs are met.

The promotional criteria contain an additional defect. Although the Act requires that the number of low income households in a city or town be considered when regional need is determined, the promotional formulas do not include consideration of this variable. To accurately determine the need for housing by region or municipality, however, the number of households requiring subsidized housing in the particular municipality or region must be related to the number of existing subsidized units. If needy households exceed existing subsidized housing in a region or municipality, the comprehensive permit and appeals procedures should apply to all the municipalities within the region, or at least to the individual municipality that does not fulfill its particular housing need. Such a standard would be far more realistic than the present promotional criteria.

The definition of low and moderate income housing also is defective. The Act makes no distinction between family and elderly housing. Because of this definitional defect, suburbs are allowed to permit only elderly housing and to exclude housing for the vast majority of the urban poor. Thus, although the need for family housing is far greater than the need for elderly housing, it is accorded less attention because of this loophole in the Act.¹²¹

A last substantive criticism is that by limiting qualified developers to public agencies and nonprofit or limited dividend organizations, the Act unnecessarily eliminates profitmaking developers who could provide substantial amounts of much needed low income housing.¹²² Further, the argument that such developers would inundate suburban communities with low income housing is without merit. The thresholds that foreclose invocation of the Act when minimum quotas have been met are adequate to prevent an oversupply of low income housing in a particular community.

121. Note, *Exclusionary Zoning in Massachusetts: Some Litigative Strategies To Combat the Status Quo*, 11 NEW ENG. L. REV. 565, 569-70 (1976).

122. See Note, *supra* note 40, at 744. See also, Note, *The Inadequacy of Judicial Remedies in Cases of Exclusionary Zoning*, 74 MICH. L. REV. 760, 791 (1976).

B. *Procedural Aspects of the Act*

Several other criticisms concern procedural aspects of the comprehensive permit and appeals processes. A major criticism is that the entire process, from application to construction, takes too long. Although the Act specifies time limitations at each stage of the comprehensive permit and appeals processes,¹²³ the maximum possible elapsed time of 170 days under the Act is not enforced.¹²⁴ Further, the HAC has unnecessarily lengthened the process beyond the statutory limitations by not closing its hearings until it renders a decision. As a result of this additional delay, the HAC has failed to meet the requirement that a decision be rendered within thirty days of the close of hearings.

The HAC has delayed its decisions for months and, in a few cases, even over a year.¹²⁵ *Melrose*, for all practical purposes, sanctioned the laggardness of the HAC. To maintain the goodwill of the HAC, however, a developer would not want to press for a timely decision. Rather, he would be inclined to agree to any delay, even though the costs in time and money may cause him to abandon the project.

The suburbs have skillfully used "dilatory tactics" to slow the process even further.¹²⁶ Counsel for boards of appeals have taken advantage of the de novo procedures of the HAC to offer evidence on "all conceivable issues."¹²⁷ Often the evidence is redundant or only remotely related to the central issues. Counsel also will ask for separate hearings on every issue involved or every site proposed by the developer or will claim the need for excessive continuances that must be granted under due process requirements.¹²⁸ If a town is willing to fight a housing proposal, the entire appeals process can take as long as three years.¹²⁹ Consequently, only the most

123. See J. BREAGY, *supra* note 3, at 15. Upon submission of an application for a comprehensive permit to a board of appeals, a board hearing must be held within thirty days. The board must issue a decision within forty days of the hearing. If appeal of the decision is to be taken to the HAC, it must be within twenty days. The HAC must hold hearings on the appeal within twenty days and issue a decision within thirty days of the close of hearings. If a decision orders a comprehensive permit to be issued, it must issue within thirty days of the decision.

124. J. Austin, S. Yoshida & D. O'Connor, *Subsidized Housing and the Anti-Snob Zoning Act*, in *THE LAND USE CONTROVERSY IN MASSACHUSETTS* 109, 121 (L. Susskind ed. 1975) [hereinafter cited as J. Austin].

125. J. BREAGY, *supra* note 3, at 36.

126. See Note, *supra* note 58, at 63.

127. *Id.* at 66.

128. *Id.*

129. See Note, *supra* note 121, at 568.

financially secure developers can economically endure such a protracted legal battle.¹³⁰ As few developers of low income housing are financially secure enough to absorb the costs of litigation and the inflated construction costs of a multi-year wait,¹³¹ the towns have been able to stall developers into abandonment of projects.

Procedural inadequacies of the Act also contribute to the extended delays. The comprehensiveness of the permit system has been negated to a great extent by the state Environmental Policy Act,¹³² the Inland and Coastal Wetlands Act,¹³³ and the Historic District Act.¹³⁴ The Environmental Policy Act¹³⁵ requires project developers to file an environmental impact report with the Secretary for Department of Environmental Affairs.¹³⁶ Comment periods and requirements for hearings on the environmental impact report can extend the approval period for a project another 105 days.¹³⁷

If an area designated as a wetland is involved in a proposed project, the developer is required by the Wetlands Act to apply to the local conservation commission for a wetlands permit.¹³⁸ The Massachusetts Department of Natural Resources also must give its approval.¹³⁹ Additionally, if an historic district is affected by a proposal, review by the local historic district commission provides an additional requirement.¹⁴⁰

These approvals are not a part of the comprehensive permit process and must be acquired subsequent to the issuance of a comprehensive permit. If opponents of a subsidized housing project fail to halt the project through the comprehensive permit process, they can circumvent the Act by claiming environmental concerns. Even if environmental approval eventually is gained, the entire approval process is unnecessarily lengthened by leaving these other permits out of the comprehensive permit system.

130. J. Austin, *supra* note 124, at 123.

131. Altman, *supra* note 29, at 9.

132. MASS. GEN. LAWS ANN. ch. 30, §§ 61-62H (West 1979).

133. *Id.* ch. 131, § 40 (West Cum. Supp. 1981).

134. *Id.* ch. 40C, §§ 1-17 (West 1979).

135. *Id.* ch. 30, §§ 61-62H; J. BREAGY, *supra* note 3, at 56.

136. MASS. GEN. LAWS ANN. ch. 30, §§ 62A-B (West 1979).

137. *Id.* §§ 62B-D; J. BREAGY, *supra* note 3, at 53.

138. MASS. GEN. LAWS ANN. ch. 131, § 40 (West Cum. Supp. 1981). *See generally id.* ch. 40, § 8C (West 1958).

139. *Id.* ch. 131, § 40 (West Cum. Supp. 1981).

140. *Id.* ch. 40C, § 6 (West 1979).

C. *Effects of the Act on Comprehensive Planning*

A final criticism of the Act is that planning prerogatives of municipalities are not adequately protected by the planning criteria standard of consistency with local needs. Issuance of a comprehensive permit for multifamily housing on land not planned for development can drastically alter or negate the best thought-out, long-range master plan for the development of a community. In effect, the Act makes planning and growth management practically impossible.¹⁴¹ The narrow definition of planning factors that are consistent with local needs should be expanded to include more local concerns and legitimate planning objectives, such as traffic considerations, "the proximity of the housing to essential services,"¹⁴² and the value of proposed sites for uses other than public housing.¹⁴³ Not only should planning considerations be expanded, they also should be given more weight when balanced against the regional need for housing. If a town objects to the use of a specific site for low income housing, it should be allowed to designate an alternative site.¹⁴⁴ The power of boards of appeals and the HAC to override local planning and zoning should be limited to only those cases in which a clear case of discrimination is apparent or proven.¹⁴⁵

In summary, the Act has been criticized from a variety of viewpoints. Some critics assert that the Act does not go far enough in attacking exclusionary zoning. Others maintain that the administrative procedures required to build low and moderate income housing are unnecessarily time-consuming and costly. Still others contend that the Act should be curtailed because it disrupts community efforts at planned and orderly growth. Given these criticisms, an assessment is in order of the Act's success at addressing the Massachusetts housing crisis and in spreading low income housing to suburban areas that formerly refused to accept such housing under their zoning practices. Consequently, to determine whether the criticisms of the Act are justified, the facts and figures concerning the living units built under the Act, in relation to the numerical need for this kind of housing, will be examined in the central cities and suburban towns of one metropolitan area.

141. See Note, *supra* note 58, at 71.

142. Rodgers, *supra* note 7, at 497.

143. See, e.g., J. Austin, note 124, at 120.

144. *Id.* at 121.

145. *Id.*

VI. A STATISTICAL ASSESSMENT OF EFFECTIVENESS OF THE ACT

Throughout the 1970's, the low and moderate income housing crisis in Massachusetts did not abate. By the mid-seventies the DCA estimated that the state's need for low and moderate income housing had risen to more than 400,000 units.¹⁴⁶ Despite this disconcerting figure, ten years after the passage of chapter 774 the comprehensive permits process had been used in only about 25% of Massachusetts' 351 municipalities.¹⁴⁷ Approximately 111 applications had been made in eighty-two jurisdictions.¹⁴⁸ Of the 14,839 housing units applied for, only 3,462, or 23.3% had been built. Forty percent of these were for elderly housing, 36% for family housing, and 24% for mixed family and elderly use.¹⁴⁹ The three-thousand-plus units built under chapter 774 and the Act provide less than 1% (.9%) of the estimated statewide need.

The housing figures for the Springfield Standard Metropolitan Statistical Area (SMSA) provide a detailed microcosm of the statewide situation. The need for subsidized housing in 1978 in the SMSA was estimated at 35,498 low and moderate income units, approximately 9% of the statewide need.¹⁵⁰ The SMSA had a total of 16,720 subsidized housing units.¹⁵¹ No municipality in the SMSA had adequate amounts of low income housing units when the municipalities' numbers of subsidized units were compared to their numbers of households requiring housing assistance. The towns of Longmeadow and Wilbraham had the poorest records. While Longmeadow had 522 families requiring housing assistance, it had no low and moderate income housing. Wilbraham provided only 10.5% of its estimated need for such housing. Holyoke and Northampton had the best records, providing 78.2% and 77.5%, respectively, of their estimated needs. Table one displays the numbers of subsidized units by town in relation to the need for such units.

From the perspective of the 10% housing minimum of the Act,

146. *Id.* at 112.

147. *See* J. BREAGY, *supra* note 3, at 17. Only two municipalities, Boston and Malden, exceeded the housing and land quota minimums and were excluded from chapter 774 provisions at the time of its passage.

148. E. RUBEN & C. WILLIAMS, *THE USE OF COMPREHENSIVE PERMITS FOR HOUSING LOWER INCOME HOUSEHOLDS IN MASSACHUSETTS* 2 (1979).

149. *Id.* *See also* J. BREAGY, *supra* note 3, at 30. Ruben and Williams' figures have been adjusted upwards using Breagy's additional information.

150. LOWER PIONEER VALLEY REGIONAL PLANNING COMM'N, *AREAWIDE HOUSING OPPORTUNITY PLAN (AHOP)* (1978). These and subsequent figures are derivations from the AHOP figures.

151. *Id.*

TABLE 1 Subsidized Housing Units in the SMSA in Relation to the Need for Subsidized Housing (1978)

	Total Subsidized Housing Units	Households Requiring Housing Assistance	Unfulfilled Need	Percent Unfulfilled Need	Percent Need Fulfilled
Springfield	7,762	16,069	8,307	51.7	48.3
Chicopee	1,618	4,536	2,918	64.3	35.7
Holyoke	2,600	3,325	725	21.8	78.2
West Springfield	537	1,743	1,206	69.2	30.8
Agawam	424	1,283	859	67.0	33.0
Longmeadow	0	522	522	100.0	0.0
East Longmeadow	279	350	71	20.3	79.7
Hampden	58	227	169	74.4	25.6
Wilbraham	45	427	382	89.5	10.5
Ludlow	172	731	559	76.5	23.5
Monson	57	292	235	80.5	19.5
Palmer	254	798	544	68.2	31.8
Belchertown	144	302	158	52.3	47.7
Granby	60	190	130	68.4	31.6
South Hadley	151	805	654	81.2	18.8
Hadley	40	338	298	88.2	11.8
Northampton	1,211	1,563	352	22.5	77.5
Easthampton	370	529	159	30.1	69.9
Southampton	26	86	60	69.8	30.2
Westfield	851	1,140	289	25.4	74.6
Southwick	61	242	181	74.8	25.2
Total or Average	16,720	35,498	18,778	52.9	47.1

SOURCE: LOWER PIONEER VALLEY REGIONAL PLANNING COMMISSION, AREAWIDE HOUSING OPPORTUNITY PLAN I-5-17, III-1-7 (1978).

however, the SMSA on the average lacked only 2.4% of the subsidized housing units that it would require. Alternatively, 97.6% of 10% of the housing units in the SMSA were subsidized housing units. Great differences, however, exist between the central cities and suburbs. Two of the three central cities, Springfield and Holyoke, had more subsidized units than 10% of their total housing units (37.8% and 40.8%, respectively). The central cities together provided 25.9% more units than their quota. When the suburbs are taken separately, they had 2,868 subsidized units less than their quota, a 37.7% deficit.

Again, Longmeadow had the worst record, a 100% deficit, as it had no subsidized housing. Wilbraham lacked 86.8% of its 10% quota.

TABLE 2 Subsidized Housing Units in the SMSA in Relation to Chapter 774's Ten Percent Minimum

	10% Of Total Housing Units	Total Subsidized Housing Units	Deficit or (Excess) Under or (Over) 10% Quota	Percent Deficit or (Excess) Under or (Over) 10% Quota
Springfield	5,634	7,762	(2,128)	(37.8)
Chicopee	2,038	1,618	420	20.6
Holyoke	1,846	2,600	(754)	(40.8)
West Springfield	965	537	428	44.4
Agawam	708	424	284	40.1
Longmeadow	448	0	448	100.0
East Longmeadow	374	279	95	25.4
Hampden	126	58	68	54.0
Wilbraham	341	45	296	86.8
Ludlow	522	172	477	67.0
Monson	195	57	138	70.8
Palmer	395	254	141	35.7
Belchertown	158	144	14	8.9
Granby	149	60	89	59.8
South Hadley	500	151	349	69.8
Hadley	124	40	84	67.7
Northampton	894	1,211	(317)	(35.5)
Easthampton	443	370	73	16.5
Southampton	91	26	65	71.4
Westfield	981	851	130	13.3
Southwick	194	61	133	68.6
Total or Average	17,126	16,720	406	2.4
Cen. City Total or Average	9,518	11,980	(2,462)	(25.9)
Suburban Total or Average	7,608	4,740	2,868	37.7

SOURCE: LOWER PIONEER VALLEY REGIONAL PLANNING COMMISSION, AREAWIDE HOUSING OPPORTUNITY PLAN I-24-25, III-1-7 (1978).

The discrepancies between the 52.9% of households requiring housing assistance who cannot get subsidized housing and the 2.4% deficit of subsidized units when compared to the 10% minimum of the Act substantiates the criticism that the minimum is set too low. Two and four-tenths percent more of 10% of the housing units would provide only 406 more units, while 18,778 more are needed in the SMSA. From a slightly different perspective, if all municipalities fulfilled their 10% minimum, the area still would need 15,173 additional low and moderate income housing units to house its poor adequately. The existing subsidized housing units in relation to the needs for such housing in the municipalities of the SMSA are provided in table two.

Table three furnishes information concerning when subsidized housing has been built or leased in relation to the passage of chapter 774. In the SMSA, 69.5% of low and moderate income housing units have been built since chapter 774 became effective. Only 2.6% of such housing built after 1969, however, has been facilitated under the comprehensive permit and appeals process. Only five proposals for such housing have been brought before the SMSA under the procedures of the law: One in Agawam, two in Northampton, one in East Longmeadow, and one in Wilbraham. Of 994 units proposed, only 300, 200 in Agawam and 100 in East Longmeadow, have been constructed.¹⁵² Permits for 320 family units in Northampton were denied by the board of appeals. The decision on 150 of these units was not appealed to the HAC. The HAC upheld the board of appeals' denial of a permit for the other 170 units.¹⁵³ The 254 units proposed in Wilbraham were granted a conditional permit by the board of appeals. The conditions were modified by the HAC in 1975, but the project has not been constructed.¹⁵⁴

When subsidized housing units built or leased since the passage of chapter 774 are considered, it becomes apparent that the vast majority of such units are family housing and not elderly housing. In the SMSA, approximately 71% of subsidized housing is comprised of family units while elderly units comprise 29%. Even if the suburbs are considered separately from the central cities, family units still outnumber elderly housing by 60.6% to 39.4%, respectively. Thus, the criticism that suburbs are building only elderly housing to avoid

152. E. RUBEN & C. WILLIAMS, *supra* note 148, at 20. See also J. BREAGY, *supra* note 3, at 30.

153. E. RUBEN & C. WILLIAMS, *supra* note 148, at 22.

154. *Id.* at 23. See also J. BREAGY, *supra* note 3, at 30.

TABLE 3 Subsidized Housing Units in the SMSA Built or Leased Before and After Chapter 774

	Subsidized Housing Unit		
	Built Prior to c. 774 (1970)	Built After c. 774 (1970-78)	Percent Built After c. 774 (1970-78)
Springfield	1,941	5,821	75.0
Chicopee	828	790	48.8
Holyoke	1,035	1,565	60.2
West Springfield	212	325*	60.5
Agawam	136	288	67.9
Longmeadow	0	0	0.0
East Longmeadow	92	187	67.0
Hampden	0	58	100.0
Wilbraham	40	5	11.1
Ludlow	40	132*	76.7
Monson	0	57	100.0
Palmer	0	254	100.0
Belchertown	0	144	100.0
Granby	0	60	100.0
South Hadley	88	63	41.7
Hadley	40	0	0.0
Northampton	328	883	72.9
Easthampton	101	269	72.7
Southampton	0	26*	100.0
Westfield	224	627	73.7
Southwick	0	61	100.0
Total or Average	5,105	11,615	69.5

* Denotes maximum figure.

SOURCE: LOWER PIONEER VALLEY REGIONAL PLANNING COMMISSION, AREAWIDE HOUSING OPPORTUNITY PLAN I-5-17, I-24-25, III-1-7 (1978).

taking on the general population of the urban poor is not borne out by these, and statewide, figures.¹⁵⁵ It should be kept in mind, however, that there was no subsidized housing built or leased in the suburbs of Hadley and Longmeadow during the 1970-78 period. Each suburb, however, had elderly subsidized housing but no family hous-

155. E. REUBEN & C. WILLIAMS, *supra* note 148, at 21.

TABLE 4 Subsidized Housing Units in the SMSA Built or Leased 1970-78 by Kind of Unit

	Elderly		Family		Total
	Number	Percent	Number	Percent	
Springfield	1,281	22.0	4,540	78.0	5,821
Chicopee	292	37.0	498	63.0	790
Holyoke	396	25.3	1,169	74.7	1,565
<hr/>					
West Springfield	100	30.8	225*	69.2	325
Agawam	176	61.1	112	38.9	288
Longmeadow	0	0.0	0	0.0	0
East Longmeadow	105	56.1	82	43.9	187
Hampden	56	96.6	2	3.4	58
Wilbraham	0	0.0	5	100.0	5
Ludlow	52	39.4	80*	60.6	132
Monson	52	91.2	5	8.8	57
Palmer	48	18.9	206	81.1	254
Belchertown	48	33.3	96	66.7	144
Granby	56	93.3	4	6.7	60
South Hadley	48	76.2	15	23.8	63
Hadley	0	0.0	0	0.0	0
Northampton	402	45.5	481	54.5	883
Easthampton	50	18.6	219	81.4	269
Southampton	0	0.0	26*	100.0	26
Westfield	112	17.9	515	82.1	627
Southwick	49	80.3	12	19.7	61
<hr/>					
Total or Average	3,323	28.6	8,292	71.4	11,615
<hr/>					
Suburban Total or Average	1,354	39.4	2,085	60.6	3,439

* Denotes maximum figure.

SOURCE: LOWER PIONEER VALLEY REGIONAL PLANNING COMMISSION, AREAWIDE HOUSING OPPORTUNITY PLAN I-24-25, III-1-7 (1978).

ing, built either prior to or after this period.¹⁵⁶ In addition, the suburbs of East Longmeadow, Monson, Granby, South Hadley, Hampden, and Southwick contained substantially greater amounts of elderly units than family units. Most of the family housing built or leased in these suburban communities is scattered site, rent-as-

156. Sixty-eight elderly housing units were constructed in Longmeadow, Massachusetts through 1979 and 1980. See *The Reminder*, June 3, 1980, at 5, col. 1.

sisted, single family housing. There are few, if any, low income housing projects in these communities. Table four divides subsidized housing into kind in the municipalities of the SMSA.

In the final analysis, one can conclude that the Act has had a negligible effect on the construction of subsidized housing in the suburbs of the SMSA. Developers are not using the process and if they do, their chances of bringing a project to completion are only two in five. Thus, the vast majority of low income housing is built outside of the comprehensive permit and appeals processes. One might conclude that the existence of the Act has induced municipalities to zone land for multifamily housing and to facilitate its construction in order to avoid the lengthy red tape involved in the Act's procedures. That 97.4% of subsidized housing built during the lifetime of the Act in the SMSA has been constructed outside the auspices of chapter 774, and the Act tends to support such a conclusion. In addition, 3,139 units, a sizable number, have been constructed in suburbia without the Act. Nevertheless, only 27% of the units built in this time period without the Act's procedures are located in the suburbs. The vast majority are located in the three central cities, two of which exceed the land area minimums of the Act and are not subject to the threat of its procedures. Although the Act may have some psychological value at inducing suburbs to liberalize their zoning practices, that value has not resulted in more than a token amount of subsidized units in suburbs such as Wilbraham and Longmeadow, and no units have been built in Hadley. The most exclusionary jurisdictions continue to resist the intent of the Act. They are not pressured by its presence into accepting subsidized housing.

The Act is even less effective in fulfilling the need for low income housing in the central cities. Springfield and Holyoke are exempt from the 10% minimum housing quotas, yet, if additional subsidized housing existed, these communities would have substantial numbers of households that would be eligible. The central cities are by no means excluding subsidized housing by zoning. They, however, are not meeting their housing needs because they have such a large number of resident poor. For example, although Springfield had almost 7,800 subsidized units by 1978, at least 5,000 more than Holyoke, the city with the next highest concentration, it was fulfilling only slightly less than half its subsidized housing need. The concentration of poor in the central cities is poignantly highlighted by these figures. In 1980 the situation was so critical in

Springfield that its mayor declared a "housing emergency."¹⁵⁷ The Springfield Housing Authority also stopped taking applications for subsidized housing because the waiting list was so long that "new applicants would be unlikely to receive housing within 12 to 18 months. . . ."¹⁵⁸

VII. CONCLUSION

The Massachusetts Low and Moderate Income Housing Act¹⁵⁹ does not facilitate low income housing construction in both city and suburb, nor does it affect the alleged cost-increasing mechanisms of single family zoning in suburbia. If suburban zoning results in economically and racially segregated metropolitan living patterns, the Act has proven to be an ineffective remedy at solving the problem of exclusionary zoning. If segregated central city-suburban living patterns, however, are not attributable primarily to zoning, but rather to other factors, then the failure of the Act to have substantive impact on metropolitan segregation would be explained somewhat. The Act can be said to be tilting at the exclusionary zoning windmill by addressing a phantom cause of an unexplained phenomenon, racial and economic segregation. In either case, the Act cannot be considered successful.

157. Springfield Daily News, Oct. 28, 1980, at 1, col. 6.

158. *Id.* Nov. 11, 1980, at 1, col. 5.

159. MASS. GEN. LAWS ANN. ch. 40B, §§ 20-23 (West 1979).